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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 560.

LOU NATHANSON, AS PLAINTIFF IN No. 12673, UNITED STATES OF AMERICA, AT THE RELATION OF AND TO THE USE OF LOU NATHANSON VS. BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., PETITIONER,

VS.

UNITED STATES OF AMERICA, APPELLANT IN CASES: No. 12673, UNITED STATES OF AMERICA, APPELLANT, VS. LOU NATHANSON (PLAINTIFF IN UNITED STATES OF AMERICA, AT THE RELATION OF AND TO THE USE OF LOU NATHANSON VS. BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL.), BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., A CORPORATION, ET AL., APPELLEES; No. 12674, UNITED STATES OF AMERICA, APPELLANT, VS. BAKER-LOCKWOOD MANUFACTURING COMPANY, INC., ET AL., APPELLEES; AND No. 12675, UNITED STATES OF AMERICA, APPELLANT, VS. BENJAMIN P. PINK (PLAINTIFF IN UNITED STATES OF AMERICA EX REL. BENJAMIN P. PINK AND BENJAMIN P. PINK IN HIS OWN BEHALF VS. BAKER-LOCKWOOD MANUFACTURING COMPANY ET AL., APPELLEES), RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT WITH MEMORANDA IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT WITH MEMORANDA IN SUPPORT THEREOF.

Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United

States Circuit Court of Appeals for the Eighth Circuit, entered September 29th, 1943, which reversed and directed the District Court for the Western Division of the Western District of Missouri (a) to stay petitioner's *qui tam* action; and (b) to accord precedence to a similar action on the same facts but filed by the United States two days after petitioner's suit was filed.[1]

SUMMARY AND STATEMENT OF THE MATTERS INVOLVED.

Petitioner's *qui tam* action was filed February 13th, 1943, to recover double damages and penalties from defendants under Secs. 3490-3494 and 5438, Revised Statutes, 31 U. S. C. 231-235, and 18 U. S. C. 80, for false claims against the United States on contracts made with the Army Air Corps (N. R. 1). Two days later, the District Attorney filed a similar action in the same court for the United States, seeking the same recovery (G. R. 1). One Pink later filed a *qui tam* action on the same facts on February 17th, 1943. He did nothing further (P. R. 1-14). That case presents no issue.

Petitioner's complaint was amended and a new defendant added before responsive pleadings were filed, as authorized by Rule 15 (a) (c) F. R. C. P. (N. R. 3-7).

Defendants Baker-Lockwood Manufacturing Company, Inc., and W. L. Mellor, on March 23d, 1943, filed separate motions to dismiss the three pending cases and to stay proceedings in at least two of them (N. R. 10; G. R. 4-5 and 8; P. R. 6). They urged that since there was but one cause of action under the statute, defense of three cases should not be required.

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[1]References to the Transcript of the Record in Case No. 12673 below are cited by the designation N. R.; those in No. 12674 by G. R.; those in No. 12675 by P. R.; and the additional and supplemental Appellate Court record by A. R.

The day before these motions were to be heard, the Government filed motions to stay proceedings in all three cases, until after the trial of a related criminal case (N. R. 8). No notice of the motions was given to any party and no briefs in support were filed, as required by local rule (N. R. 8).

The Government's motions were overruled (N. R. 10). The trial court stated that if trial was had on the date then set, the criminal case would be first tried (N. R. 14).

Defendants' motions to dismiss and to stay in petitioner's case were overruled. Like motions in the United States and Pink cases were sustained. The trial court held that petitioner's prior action appropriated the single cause of action created by the statute (N. R. 10).

The criminal fraud case was thereafter continued twice, first, for a new indictment, and later because the presence of material witnesses was prevented by the Government (N. R. 13). Petitioner's case was definitely set for trial on October 4th, 1943 (N. R. 14), for which petitioner and his counsel diligently prepared.

The Government filed a purported appeal in petitioner's case (to which it was not a party), which was limited to the order of April 10th, 1943, denying the application of the United States to stay proceedings pending the criminal trial (N. R. 12). There was no appeal from the order of April 15th, 1943, denying defendants' motions to stay, and permitting petitioner's case to proceed (N. R. 12).

A preliminary motion to order stay of the trial of petitioner's case pending the Government's appeals, was denied by the Circuit Court of Appeals (N. R. 22).

On filing transcripts of the record in the Circuit Court of Appeals, petitioner moved to dismiss the purported appeal of the United States in his case because (1) there was no statutory or other right to review District Court decisions which were not final, except in proceedings for injunction, etc.; (2) the denial of the Government's mo-

tion to stay was not an injunctive nor a final order; (3) the Government was not a party to petitioner's case and had no right to appeal or to file a motion to stay it, and neither defendants nor the Government appealed from the order denying defendants' motion to stay; (4) because the Government's motion to stay did not allege facts authorizing the relief prayed; (5) that the Rules of Civil Procedure and local rules were disregarded by the United States, in failing to serve a copy of the motion or a memorandum brief; and (6) that the appeal was not in good faith in the usual course of judicial proceeding, but for mere delay while the Department of Justice sought enactment of House Resolution 1203 (A. R. 6[2]; Cong. R. 7/7/43, pp. 7403 *et seq.*, 7/8/43, pp. 7515 *et seq.*, and 9/17/43, pp. 7693 *et seq.*).

There was no direct ruling on petitioner's motion to dismiss the appeal. The District Court order of April 10th, 1943, overruling the Government's motion to stay pending trial of the criminal case, was affirmed. The three cases were remanded with directions (a) to stay all proceedings in petitioner's case and in the Pink action; and (b) to grant the Government precedence in the trial of its civil action filed two days after the single statutory cause of action had been appropriated by the filing of petitioner's case (A. R. 13).

OPINIONS BELOW.

The District Court's opinion (holding petitioner, by filing the first suit under the False Claims Statutes aforesaid, had appropriated the sole cause of action created thereby, to the exclusion of subsequent suitors, including the Government) is printed at N. R. 10. The Circuit Court of Appeals' opinion reversing the District Court (A. R. 13) is reported in 138 F. 2d 48.

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[2]This is demonstrated by the text of the private letter addressed to the trial court by the Attorney General (A. R. 6).

STATUTES INVOLVED.

The statutes involved are Revised Statutes, 3490-3494 and 5438, 31 U. S. C. 231-235, and 18 U. S. C. 80. They appear in the appendix, pp. 27-29.

JURISDICTION.

The decision of the Eighth Circuit Court of Appeals, for which review is sought, was entered September 29th, 1943 (A. R. 23). Motion to stay the mandate pending petition for certiorari filed October 13th, 1943 (A. R. 24) was denied October 25th, 1943 (A. R. 25).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13th, 1925, and the Act of March 8th, 1934 (28 U. S. C. A., Sec. 347 (a)), and Rule 38 of this Court, in that the Circuit Court of Appeals (1) decided important questions of substance and of public concern which are of special importance in the public interests and contrary to and which nullify the adjudication of this Court in *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 87 L. Ed. 374, in that (a) the decision granted to the Attorney General the power of control over the institution and prosecution of *qui tam* actions under the False Claims Act which is now fully usurped in this and other Circuits despite the direct ruling of this Court in the Marcus case that he did not possess such power; and (b) it nullified the finality of adjudications of this Court and the authority of the Congress to determine the policies to protect the United States against war frauds, which this Court declared and sustained in the Marcus case, and transferred it to the executive branch; (2) decided important questions of Federal substantive law and procedure which have not been, but should be, settled by this Court, in that, (a) the decision impaired the obligation of the lawful statutory contract offered by the False Claims Act and

accepted by petitioner by filing his prior *qui tam* action and incurring expense and obligation thereby, and (b) thereby denied petitioner due process of law and equal protection of laws contrary to the Fifth Amendment of the Constitution of the United States; and (3) the decision so far departed from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision (a) because jurisdiction was exercised on appeal without statutory or other right in reviewing and reversing District Court orders which were not final and not of injunctive nature, and (b) because the decision reversed the order denying a stay of petitioner's action, from which neither defendants nor the Government appealed, and (c) jurisdiction was exercised to reverse petitioner's case on an appeal of the United States, which was not a party to the action, and (d) because due process of law and the right to be heard was denied petitioner by the denial of a trial of his case, which first appropriated the cause of action created by the False Claims Statutes.

QUESTIONS PRESENTED.

1. Where two days before the Government filed a similar action, petitioner had already filed a *qui tam* action for and in the name of the United States to his use, to recover the statutory damages and penalties from defendants as authorized by the False Claims Statute,[3] did the decision of the Eighth Circuit Court of Appeals, on a purported appeal by the United States from a procedural order, err in ruling contrary to the adjudication of this Court in *Marcus* v. *Hess*:[4]

(a) That the False Claims Act granted to the Attorney General of the United States the sole and absolute

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[3]31 U. S. C. 231-235, and 18 U. S. C. 80; R. S. 3490-3494 and 5438.

[4]See 317 U. S. 537, 87 L. Ed. 374, 378.

power to control the institution and prosecution of all *qui tam* actions thereunder after the United States at any time elected to sue in its own behalf, and its officers were thereafter prepared to proceed with diligence?

(b) Where the United States elects to file such suit after an informer has already filed one, must it be granted precedence in the trial of its action and must any prior informer's case filed under the False Claims Statutes be stayed so long as it appears that officers of the United States are prepared to thereafter proceed with diligence?

(c) That an informer filing the first action against defendants under the False Claims Statutes for defrauding the United States either acquired no rights, or alternatively lost them when the United States later elected to file its own action?

(d) That the United States may project itself into a prior *qui tam* action filed by petitioner under the False Claims Statutes by filing a motion to stay proceedings therein, after it filed its own later action against the same defendants and was entitled to appeal from the order denying a stay in the informer's case?[5]

(e) That appeals of the United States filed in its later case and in petitioner's case should be consolidated, and an order made to reverse the informer's case and to set aside an order made therein from which no appeal was taken?

(f) That an order granting or denying a motion to stay proceedings is clearly injunctive in nature and is appealable under Section 129 of the Judicial Code, 28 U. S. C. 227.

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[5]A. R. 7, Honorable Francis Biddle, Attorney-General, in letter addressed to District Judge Otis, dated July 21st, 1943, said:

> "The civil suit, as you are undoubtedly aware, is not under my control. The statute which gives the right of suit to an informer, in the name of the United States, *does not provide for governmental control of that litigation.*"

2. (a) Where the common offer extended to citizens by the False Claims Statutes was accepted by petitioner by filing his *qui tam* action before any similar action was instituted against defendants charged with defrauding the United States, and he paid and incurred liability for costs, took depositions, and actively prepared his case for trial, was petitioner unlawfully deprived of vested quasi-contractual statutory rights and of due process of law and of equal protection of laws under the Fifth Amendment of the Constitution of the United States, by the decision of the Eighth Circuit Court of Appeals, which ruled that the petitioner had no right to proceed with his action because the United States two days later filed a suit in its own behalf, which its officers were then prepared to prosecute with diligence?

(b) Were the obligations of statutory quasi-contractual rights thereby impaired?

3. May a court of inferior jurisdiction authorize the Attorney General of the United States to usurp the powers which he asserted but which were rejected by this Court and decreed to be subject to legislative supremacy in *U. S. ex rel. Marcus* v. *Hess.*

REASONS FOR GRANTING THE WRIT.

It is in the public interests that full jurisdiction of the subject matter should be vested in this Court by issuing the writ in the ordinary, usual and accepted course of judicial proceedings. The decision for which review is prayed imperatively requires the exercise of such jurisdiction, to:

(1) Vindicate and maintain the legislative supremacy to determine policies and to limit the activities of executive departments, as but lately adjudicated on January 18th, 1943, in *U. S. ex rel. Marcus* v. *Hess.*

(2) Vindicate and maintain the dignity and constitutional finality of the decisions of this Court and the

constitutional authority of this Court to require observance thereof by executive departments and courts of inferior jurisdiction.

(3) Vindicate and maintain the constitutional separation of the powers of government as sustained and declared in *U. S. ex rel. Marcus* v. *Hess*, and to quash *coram non judice* proceedings on appeal purporting to confirm usurpation by the Department of Justice of the power to control *qui tam* actions, after that power was denied with finality by adjudication of this Court.

(4) Vindicate and maintain the finality of the authority of this Court to prohibit usurpation by an executive department of powers reserved to legislative authority after definite adjudication denying the existence of such powers.

(5) Vindicate and maintain the constitutional denial of authority to impair the obligation of contracts lawfully entered into by the United States.

(6) Vindicate and maintain the faith and credit of the United States and to quash a decision renouncing the contractual obligations of the United States arising from the timely and exact acceptance of a statutory offer made binding upon the United States by enactment of the supreme legislative authority and approved by the highest executive authority, and but lately construed and sustained by this Court.

(7) Prevent judicial fiat on appeal interpolating into the False Claims Statutes a nonexistent provision to grant governmental control over the institution and prosecution of *qui tam* actions. This Court within the year had denied the existence of such power and suggested that recourse was to the legislative forum. The decision contravenes the latest expressions of this Court in *U. S. ex rel. Marcus* v. *Hess*.[6]

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[6]"Second. Previous to the filing of this action these respondents were indicted for defrauding the government

On January 18th, 1943, this Court, in explicit and unmistakable terms, denied the Attorney General the power of control over the institution or prosecution of *qui tam* actions filed by informers under the False Claims Statutes.

The Justice Department emphatically opposed both the theory and policy of the Act before this Court. It asserted that effective law enforcement required the Attorney General to control the filing and prosecution of such actions.

This Court carefully reviewed the Act, with its legislative history. It reiterated that the Constitution committed to the Congress the supreme and exclusive authority to determine and fix the policies best designed to protect the United States against fraud. In denying the vehement departmental arguments that it was inconceivable under present conditions that the Attorney General did not possess complete control of all litigation affecting the interests of the Government, this Court recognized that while conditions may change, no change was thereby effected in the organic division of governmental powers. It ruled that the statute had not been changed, and said, "But the trouble with these arguments is that they are addressed to the wrong forum."

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and on a plea of *nolo contendere* were fined $54,000. They, and the government which has filed a brief *amicus curiae* at our request, assert that the petitioners received their information not by their own investigation, but from the previous indictment; and both argue that Secs. 3490-3493, 31 U. S. C. A., Secs. 231-234, should not under such circumstances be construed as permitting suit by the petitioners. The petitioners deny that they relied upon the information contained in the indictment, assert that they spent money in conducting an investigation of their own, and claim that they presented more evidence than the government had discovered.

"Even if, as the government suggests, the petitioners have contributed nothing to the discovery of this crime, they have contributed much to accomplishing one of the purposes for which the Act was passed. Their suit results in a net

Every departmental argument advanced was fully discussed and rejected. The identical arguments adopted and announced as controlling law by the Eighth Circuit on appeal were here disapproved after detailed consideration.

There was no departmental acquiescence in the Marcus adjudication of legislative supremacy and exclusive authority within its appointed sphere, nor in recognition of the constitutional finality of decisions of this Court in construing legislative acts and decreeing enforcement thereof by the executive power in conformity therewith.

Confirmation of the powers asserted, but unconditionally rejected in this Court, was sought, but not in the forum suggested. The United States filed a motion to stay proceedings in petitioner's case until after trial of related criminal indictments. Overruling of that motion supplied the vehicle for a purported appeal to the forum selected. There the departmental plea was mistaken for "the voice of the people."

The Eighth Circuit decision on the purported appeal readily granted the power to the Attorney General and his department, that was denied by this Court. The prior obscurity and error concealing the true meaning and legislative intent of the statute was swept away by the decision, after a ready preliminary determination that the

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recovery to the government of $150,000, three times as much as the fines imposed in the criminal proceedings; and this recovery was obtained at the risk of a considerable loss to the petitioner since Sec. 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of the litigation.

"Neither the language of the statute nor its history lends support to the contention made by respondents and the government. 'Suits may be brought and carried on by any person,' says the Act, and there are no words of exception or qualification such as we are asked to find. The Senate sponsor of the bill explicitly pointed out that he was not offering a plan aimed solely at rewarding the conspirator who betrays his fellows, but that even a district attorney, who would presumably gain all knowledge of a fraud from his official position, might sue as the informer:

United States rightfully interjected itself as a party in petitioner's *qui tam* action, and properly appealed from a procedural order denying a stay until trial of related indictments.

It was found to be clearly manifest that granting or denying such an order was injunctive in nature and unquestionably within the terms of 28 U. S. C. 227, to authorize the appeal. The District Court was reversed and ordered to stay petitioner's action and to grant precedence to the United States in the trial of its action, notwithstanding that it was filed two days after the single right of action for recovery of the statutory sanctions had already been appropriated by the prior filing of petitioner's case.

The False Claims Act, under the Eighth Circuit's enlightened construction, and the Marcus decision under the lens of differentiation, became ductile.

The inherent, self-evident intent of the False Claims Act was adjudged to require dispossession of an informer from the field, after he first opened engagement with defendants, when and if lethargy was once overcome by officers of the United States charged with vigilance in enforcing its rights and their decision was made that thenceforth they were prepared to prosecute its interests with diligence. Thereafter, absolute control with the right of precedence in the trial even of a case subse-

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> " 'The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. Even the district attorney, who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to one half the forfeiture under the *qui tam* clause, and to one half of the double damages which may be recovered against the persons committing the act.'[10]
>
> "The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what

quently filed, must be accorded to them. The question presented was *sui generis*. Obviously, it was not controlled by the Marcus opinion; for there the Attorney General not only filed no action, but opposed Marcus in the prosecution of his case.

If given judicial consideration, no allusion is found to the compelling solemnity of contractual obligations made binding upon the United States after acceptance, by statutory offer of the sovereign people, acting through their lawfully ordained and elected representatives, followed by approval of the highest executive authority and but lately construed and declared valid by the supreme judicial power. The difficulties encountered in overcoming the recognized judicial restraints upon impairing contractual obligations, lawful when entered into under the existing highest judicial construction of a statute, even when changed by a later decision, if found burdensome, were borne in silence.

No solace was extended petitioner for the costs paid and obligations incurred in filing and diligently preparing his case for early trial, nor for the travel and expense required for numerous depositions, nor for his ouster saddled with full liability for costs. Passed without comment also, was the reflection cast by enlightened construction upon the integrity, honor and good faith of the elected representatives of the people. Their true intent was held to be to arouse United States officers out of

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it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General;[11] that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not.

lethargy into vigilance, at the expense of an informer, but with that purpose once accomplished, the trap of dispossession should drop the informer into a pitfall so as not to impede the feet of those belatedly inspired to move by his prior activity.

The constitutional supremacy of the Congress in the sphere of legislation, so carefully reiterated and sustained here, and the supremacy of this, the only Court created by the Constitution and in which alone is vested the authority to speak with finality, are nullified. The usurped power denied alike by Court and Congress are usurped and now fully exercised by the Justice Department. The Eighth Circuit pronouncement of true statutory meaning has since successfully blended with the executive voice in other jurisdictions, where motions to dismiss *qui tam* actions have been sustained. The decision of which review is sought is currently the accepted and controlling authority, in fact. Constitutional finality of decision has been effectively displaced by executive repudiation benignly sustained, along with an appellate procedure of first impression quite different from all patterns of precedent.

That there is a true and sincere belief that the call of duty justifies the usurpation of power is not ques-

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"Furthermore, one of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds.[12] To that end, prosecuting attorneys were enjoined to be diligent in enforcement of the Act's provisions, and large rewards were offered to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.

"The very fact that Congress passed this statute shows that it concluded that other considerations of policy outweighed those now emphasized by the government; for most of the arguments made here militate against any informer action at all. Had the government filed a suit prior to that instituted by these petitioners, a different question would be presented. Cf. *Francis* v. *United States*, 5 Wall. (U. S.) 338, 18 L. Ed. 603. Under the circumstances here, we could not, without materially detracting from its clear scope, decline to recognize the petitioner's right to sue under the Act."

tioned but is attested by a character without fear and above reproach, which may not be impugned. Sincerity of action, however, is the only flame to which the foundations of government are subject. Zeal has blinded the true intent to sustain and never to destroy. Admonition was ineffective. A direction for exact navigation on the true course will unhesitatingly be followed with undiminished zeal.

(8) Determine that the single cause of action created by the False Claims Statutes was appropriated when petitioner first filed his suit to recover the statutory sanctions for frauds against the United States. The statute as here construed clearly excludes any later suitors from control. Under the recognized principle that two actions for the same cause may not be maintained at the same time, the subsequent cases, including the Government's later case, were properly stayed by the District Court. This rule with respect to *qui tam* suits or "public actions" is as old as the common law.[7]

(9) Decide that the Government, under all the authorities found, was not a party to petitioner's case, and had no right to file the motion to stay that action.[8]

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[7]See *U. S. ex rel. Marcus* v. *Hess*, Headnote 4, and footnotes thereunder.

See *U. S. ex rel.* v. *Hendrick*, 52 F. Supp. 60, 61 (1), Adv. Sh. 12-6-1943.

U. S. v. *B. F. Goodrich Co. et al.*, (D. C., N. Y.) 41 F. Supp. 574, l. c. 575, saying:

"Obviously, under the general rule well known and so long adhered to, one plaintiff should not be permitted to bring and maintain at the same time more than one action for the same relief. The only plaintiff in an action such as this must be the United States, no matter who brings it on its behalf. Before the commencement of this action, suit

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[8]We find in 3 L. Ed. l. c. 448, in connection with the case of *Livingston* v. *Dorgenois*, *supra* (not a *qui tam* action), this significant language:

(10) Decree that neither the defendants nor the Government filed any notice of appeal from the order entered by the District Court in petitioner's case granting him right of trial of the single statutory cause of action. The only purported appeal was from the order refusing the Government's motion to stay pending trial of the related criminal case (N. R. 12). The trial court's action on this motion was affirmed.

Rule 73 (b), Rules of Civil Procedure, provides:

> "*The notice of appeal shall* specify the parties taking the appeal; shall *designate the judgment or part thereof appealed from* (italics ours); and shall name the court to which the appeal is taken."

Where the notice to appeal designated the particular order and judgment from which appeal was taken, other matters not therein specified were not presented for review. *Chlupsa* v. *Posvic*, (C. C. A. 7, 1940) 113 F. 2d 375; *Carter* v. *Powell*, (C. C. A. 5, 1939) 104 F. 2d 428, rehearing den., 104 F. 2d 1012, cert. den. (1940), 60 S. Ct. 173, 308 U. S. 611, 84 L. Ed. 511.

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had already been commenced by the United States in the Mandel case, for the very same relief sought by Scott here. There can be no division of the moneys collected, because among other reasons, the statute expressly provides that such a suit shall be at the sole cost and charge of the person bringing it; and the proceeds are to be divided one-half to him and the other half to the United States. Others are excluded. Even the sovereign has no right to interfere. The first plaintiff has sole control of the action, except that he cannot dismiss it without consent of the judge and the District Attorney. Under the circumstances, this action must be stayed. *United States* v. *Griswold*, 26 Fed. Cas., p. 42, No. 15266; *Bush* v. *United States*, (C. C.) 13 Fed. 625; *United States* v. *Dwight Manufacturing Co.*, (D. C.) 213 Fed. 522; *Beadleston* v. *Sprague*, 6 Johns, (N. Y.) 101; *Ferett* v. *Atwill*, 8 Fed. Cas., p. 1161, No. 4747."

"The government of the United States has no greater right to stay the proceedings in a suit between third persons, than any other individual; and no individual can stay the

The stay order made in the Government's case on defendants' motion was not an appealable order under Section 129, Judicial Code, 28 U. S. C., Sec. 227. The order reads (N. R. 10):

> "Proceedings in Cases 1408 (Government's case) and 1411 (Pink case) are stayed until the further order of the court."

The order was not decisive of the case. It was not of any injunctive nature within Section 129. If the trial court later determined that the Government should proceed with its case instead of petitioner, a mere change of place on the court's docket would accomplish it. The stay order made was a mere procedural stay, from which, in the circumstances, no appeal is provided.

(11) Settle that when the common statutory offer extended alike to all citizens by the False Claims Statutes was accepted by petitioner, by filing his *qui tam* action prior to any similar action, and he incurred liability for and paid costs and actively prepared his case for trial, the Eighth Circuit's decision on appeal unlawfully deprived him of vested quasi-contractual statutory rights and of "due process of law" and equal protection of laws

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U. S. v. *Griswold*, 24 Fed. 361 (1885), affirmed 30 Fed. 361 (1887), saying:

> "By virtue of the statute prescribing the forfeiture and damages recovered in this case, and authorizing any one to sue for them who would, the defendant, Griswold, became bound to pay the same to the prosecutor herein, the one-half for himself and the other half for the use of the United States. The law implied a contract to that effect, and the judgment obtained thereon is so far the private property of the prosecutor, and cannot be released or satisfied without his consent, any more than if it had been obtained in a private

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proceedings in such cases upon the mere suggestion of interest or collusion without becoming a party to the suit. It is true that the United States cannot be brought into court as defendant in all cases; but shall it therefore come when it

under the Fifth Amendment to the Constitution of the United States. The anomalous ruling was that he acquired no rights under the statutes, or was divested thereof when officers of the United States subsequently evidenced interest and activity by filing a similar suit for the United States for the same recovery.

The Act provides that (1) "such suit may be brought and carried on by *any person*, as well for himself as for the United States"; (2) it "shall be at the sole cost and charge of such person"; (3) it may not be dismissed by the United States, although it may be dismissed by the *qui tam* plaintiff with the consent in writing of the judge and District Attorney; and (4) the person bringing suit shall be entitled to one half of the sanctions imposed.

Petitioner's action was authorized by express statute. He undertook the sole burden of costs. In the Marcus case, this Court recognized the informer's interest in the outcome of his action in saying, "The recovery was obtained at the risk of a considerable loss to the petitioner since Section 3491 explicitly provides that the informer must bear the risk of having to pay the full cost of the litigation."

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action on the bond of the defendant. 3 Bl. Comm. 159. *For, although the king might, by a pardon of the offender, bar or prevent a popular action before it was commenced, he could not, by this or any other means known to the law, interfere with its prosecution after it was commenced, or release or dispose of the prosecutor's interest in the judgment therein.* 6 Bac. Abr. 134; 4 Bl. Comm. 399; Whart., Crim. Pl., Sec. 528; 1 Bish., Crim. Law, Secs. 909, 911; *U. S.* v. *Lancaster*, 4 Wash. C. C. 64; *Shoop* v. *Com.*, 3 Pa. St. 126; *U. S.* v. *Harris*, 1 Abb. (U. S.) 110; *Ex parte Garland*, 4 Wall. 381; 2 Hawk. P. C., c. 37, Secs. 34, 54."

It is significant that in the Griswold case the Government was willing to release a $23,576 fraud claim for $100. Cf. *U. S. ex rel. Marcus* v. *Hess*, in which the Government was satisfied

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pleases, and interfere in private concerns? It is sufficient that it can seize what it pleases, and hold what it seizes, without being compellable to account. But it is the only civilized

The statute offered a definite award as an inducement to "*any person*" who successfully protects the United States against and recovered for false claims made. The person first accepting the statutory offer automatically assumed the entire risk of loss. Petitioner's acceptance and active preparation for trial created and continued a mutual covenant with obligations resting on both parties.

In *Wilson* v. *United States*, 135 F. 2d 1005, where the Third Circuit had under consideration an informer's rights under the Tucker Act, it was said:

> "We think that in enacting Section 619 Congress intended the Secretary of the Treasury to make an award and pay compensation to an informer who gave valuable original information to the United States. There is therefore an implied contract within the meaning of the Tucker Act between the United States and the informer who brings himself within the purview of Section 619. As was stated by Mr. Justice Stone in *Dismuke* v. *United States*, 297 U. S. 167, 172, 56 S. Ct. 400, 403, 80 L. Ed. 561, the United States is not bound to provide a remedy in the courts because it has created claims against itself, but '* * *

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with a fine amounting to about one-third of the recovery in the informer's suit.

That the rule contended for by petitioner is as old as the common law is demonstrated by the following authorities:

Year Book 1, Henry VII, fol. 3a (Mich. T. Plea 2 (1485)).

"Once the person who desires to sue (in a popular, or informer's action) has commenced his action, the action is his and it is no longer a popular action, for by bringing suit he has appropriated for himself the (heretofore) strange popular action which before did not belong to him, and neither the King nor any one else can release it as far as his interest is concerned.

"Finally, in all those cases in which a stranger has not yet commenced an action, the King can grant a pardon and re-

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government that refuses to submit its right to judicial decision. * * *

in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer.' In *Tyson* v. *United States*, 32 F. Supp. 135, page 137, 91 Ct. Cl. 139, the Court of Claims reached a conclusion similar to that which we have expressed in respect to the construction of Section 619, stating, 'In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts.' "

In *Dismuke* v. *United States*, 297 U. S. 167, 80 L. Ed. 560, l. c. 566, we find:

"* * * But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. * * *"

While it is established that a reward is revocable at any time before earned or accepted, and anything is done in relying upon the offer (*Shuey* v. *U. S.*, 92 U. S. 73, 23

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lease (the claim) and that will constitute a bar against everybody" (Matters in brackets interpolated by us).

Stretton v. *Taylor*, 1 Leo. 119, 74 Eng. Rep. 111 (1588/89). *Qui tam* action brought by private informer, the Queen's attorney pleaded *non vult prosequi*. HELD, the *nolle prosequi* does not prejudice the private informer. *Same case*: Cro. Eliz. 138. Cf. Cro. Eliz. 583.

11 Coke 66b.

"Note reader, Trin. 31 El. in this Court *inter* Stretton *qui tam*, etc., and Taylor it was adjudged that after a popular action brought, although the King's Attorney will enter

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"It is also objected, that if the cause be sent back, the United States cannot have a hearing. But the United States may intervene, which is a process analogous to a bill of inter-

L. Ed. 697; *U. S.* v. *Connor*, 138 U. S. 61, 34 L. Ed. 860), this Court has consistently ruled that a contract arises when "anything has been done in reliance upon it," or if "something has been done to complete a contract or settle and establish a right under the offer."

In *Lynch* v. *U. S.*, 292 U. S. 571, 577, 78 L. Ed. 1434, it was ruled that "War Risk policies, being contracts, are property and create vested rights." Speaking for a unanimous court, Mr. Justice Brandeis said, at page 579:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of contract with it are protected by the Fifth Amendment."

In the Lynch case, the United States contended that it may be sued only by consent. That issue is not presented here. The Government interjected itself into petitioner's case, and on appeal to the forum selected, a new concept of the true statutory intent was declared, which repudiated the contractual obligations recognized here.

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ulterius non vult prosequi, or the defendant pleads a special plea although the use is, that the Attorney General replies only, yet if he will not reply or prosecute for the King, the informer may prosecute for his part, for by the suit of the informer commenced, he has made the popular action his private action which the King nor any other can release as to his interest."

3 Coke Inst. 238.

"After an action—popular be brought *tam pro domino Rege quam pro se ipso*, according to any statute, the King cannot discharge but his own part and cannot discharge the informer's part, because by the bringing of the action he hath an interest therein: but before action brought the King

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pleader. It is not true that they cannot intervene but as auxiliary to the plaintiff or defendant. This is shown by Pothier,

Coombes v. *Getz*, 285 U. S. 434, 76 L. Ed. 866, held directors to a double liability imposed by a clause in the Constitution of California. It was repealed pending an appeal. This Court ruled that when a contractual obligation arose by virtue of the Constitutional provision and the right to enforce it became vested, it was within the constitutional protection of the contract clause and the Fourteenth Amendment.

On acceptance of the contract voluntarily offered by supreme authority for and in the name of the United States, it became pledged. The Fifth Amendment stands as a bulwark which neither the Eighth Circuit by evolving a changed and strange construction, nor even the Congress, by subsequent legislation to change the former legislative policy of the United States, may lawfully surmount, without violence to the law of the land.

The United States is as firmly bound upon acceptance of its statutory offer to contract as any individual under similar circumstances.

The informer is the primary party to whom the False Claims Statutes, by their language, grant a vested interest, and upon whom it imposes the obligation to pay all costs. It differs therein from other statutes construed by the courts.

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may discharge the whole (unless it be provided to the contrary by the Act) because the informer cannot bring an action or information originally for his part only, but must pursue the statute, and if the action be given to the party grieved the King cannot discharge the same."

4 Blackstone 399.

"Neither, lastly can the King pardon an offence against a popular or penal statute, after information brought; for thereby the informer hath acquired a private property in his part of the penalty."

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cited by the Attorney-General. He speaks throughout of the right of the third person who intervenes. But if the United States cannot intervene joining one or the other party, why

An informer under the type of an Act of 1861 had no right to object to the dismissal of a suit by the Attorney General, because he had no part whatever in the suit. *Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196. So, in *U. S.* v. *Thomasson*, 4 Biss. 336, Fed. Cases No. 16479 (1889), an informer under the Internal Revenue Act of 1864 was held not to have a vested interest, and he could not object to which remitted the whole penalty. There again, the informer was not a party to the action. The action and right of recovery were vested solely in the United States.

In *U. S.* v. *Conner, supra*, the Court could find no vested interest granted to an informer by the Internal Revenue Law as amended in 1866, when the informer provision was repealed in 1872. Again, the informer was not a party to the suit and had no claim except such allowance as was fixed by the Secretary of the Treasury after collection of the judgment.

None of these Acts made the informer a party to the suit, nor imposed upon him the obligation for the costs therein. Compare: *U. S.* v. *Griswold*, 24 Fed. 361 (1885), affirmed 30 Fed. 361 (1887); *U. S.* v. *Goodrich Co. et al.*,

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From Bacon's Abridgment of the Law—Pardon B.

"The King can by no charter whatsoever bar any right of Entry of Action or any legal Interest or Benefit theretofore vested in the subject; and therefore it seems clear that he cannot bar any action on a statute by the party grieved, nor even a popular action commenced before his pardon, nor a recognizance for the Peace before it is forfeited."

From Comyn's, A Digest of the Laws of England: *Sub. nom.* Pardon F What (offences pardon does) not (discharge).

"Nor, an action commenced *qui tam*, etc., upon a penal statute except for the King's moiety or part."

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not join the defendant who claims under the United States? If his defense is imperfect, why not help him? If collusive, why not make a better?

41 F. Supp. 574, l. c. 575; *U. S. ex rel. Marcus* v. *Hess*, (1943) 317 U. S. 537, 87 L. Ed. 374, 378, construing the False Claims Statutes here involved.

That the vested interest of an informer under the False Claims Act is not within the rule that no vested interest may accrue in governmental gratuities or in a grant of governmental power (such as this Court spoke of in the *Lynch case, supra*) is indicated in that opinion, where Mr. Justice Brandeis said, "Pensions, compensations, allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right."

Likewise, in *U. S.* v. *Powelson*, 87 L. Ed. 976, it was said:

> "The grant of the power of eminent domain is a mere revocable privilege for which a state cannot be required to make compensation."

Here protection was denied to a vested contract right duly created by a statutory offer exactly and timely accepted, whereby the United States and the petitioner became mutually obligated when petitioner, for himself as well as for the United States, filed his action against

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"Even under the Roman civil law, the Emperor himself cannot by rescript affect the property of a person who has not been heard. Code, Tit. 4, C. J. Civ., Vol. 2, p. 258."

In *Burrell* v. *United States*, (C. C. A. 9) 147 Fed. 44, 46, it was held:

> " 'Parties' include all persons who are directly interested in the subject matter in issue, who have a right to make a defense, control the proceedings or appeal from the judgment. Strangers to a suit are persons who do not possess these rights."

See also, for one of the best recent dissertations on the question of "parties" correlating the definitions thereof and citing the cases in connection therewith, Judge Hutcheson's dissenting opinion in case of *Tex-O-Can Flour Mills* v. *United States*, 49 F. Supp. 516, l. c. 522, 523.

defendants. He incurred costs and liability for subsequent expenditures of money required to prepare the case for trial. He was obligated to protect the interests of the United States. He could effect no compromise and could not dismiss without approval and consent of the Court and the Attorney General. The mutual obligations resting on him and upon the United States were reviewed and delineated with authoritative finality in the Marcus case, and make it indisputable that, as in the Lynch case, the vested rights of petitioner are "rights against the United States arising out of contract," for the full performance of the obligations of which the faith and credit of the United States stands as a solemn pledge. The honor of the United States has never been stained by denial of that pledge by either usurped or lawful authority.

Conclusion.

The questions here involved are not merely of interest to the litigants, but of great general importance to all citizens of the United States. Many other *qui tam* actions, such as petitioner's, wherein the Government either filed no suit, or a belated suit, are pending and will be determined by the ruling herein. It is respectfully submitted, therefore, that there is presented a proper occasion for the exercise of the supervisory powers of this Court.

LOU NATHANSON,
Petitioner,
By J. FRANCIS O'SULLIVAN,
MAURICE J. O'SULLIVAN,
Counsel for Petitioner.

APPENDIX.

Sections 3490-3493 of the Revised Statutes 12 Stat. 696, 31 U. S. C., Sections 231-234) read as follows:

"Sec. 3490. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'Crimes,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

"Sec. 3491. The several district courts of the United States, the Supreme Court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"Sec. 3492. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the sev-

eral Territories, to be diligent in inquiring into any violation of the provisions of section thirty-four hundred and ninety by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit.

"Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States."

Section 5438 of the Revised Statutes, 12 Stat. 696, reads as follows:

"Sec. 5438. Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll,

account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipment, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."